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ABSTRACT

Many college and university administrators have responded to the recent increase in hateful incidents on campus by putting hate speech codes into place. The establishment of speech codes has sparked a heated debate over the impact that such codes have upon free speech and First Amendment values. Some commentators have suggested that viewing hate speech as a special category of expression, unworthy of traditional protection, will result in unpredictable consequences. Many administrators, however, feel that the codes are justified because of the threat that hate speech poses to the educational process and environment. Many administrators also feel that institutions of higher learning should at least be responsible for the behavior of students. Most of the arguments supporting hate speech codes focus around the notion that establishment and maintenance of a university "community" is essential. But every community--including a college or university community--must accept some degree of violation of its norms. There is also no legitimate reason to view students as inherently more vulnerable simply because they are on campus. Although codes are concerned with protecting women and minorities, the use of a regulatory response to hate speech is problematic. The possibility that open discourse might spread sexist and racist ideas should not be a cause for alarm. (Forty-seven notes are included.) (NKA)

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"Hateful Help--A Practical Look at the Issue of Hate Speech"

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"Hateful Help--A Practical Look at the Issue of Hate Speech"

Hate and hateful speech have always been with us. The news media have reported an increase in such hateful activities on American college campuses. One source cited numerous hateful incidents at colleges throughout the nation.[1] "Reports of this kind of outrageous, blatantly racist, sexist, or heterosexist events...have become increasingly frequent in the late 1980s and early 1990s."[2] Indeed, it has been suggested that few "colleges can claim to have remained free of such events...".[3] These incidents bridge a spectrum of events ranging from "verbal assaults in various public and 'private' settings to the "defacement of posters and walls with swastikas....and KKK signatures....."[4]

Many college and university administrators have responded to the increase in hateful incidents on campus by putting hate speech codes into place. "Universities are increasingly restricting anti-minority and sexist expression--hate speech" as a response to what many see as a threat to the educational opportunities "of victimized students".[5] This trend has become the norm on college and university campuses. "The great majority of college presidents have either put a speech code in place" or have "tried to avoid the subject."[6]

The establishment of hate speech codes has sparked a heated debate over the impact that such codes have upon free speech and First Amendment values. Some commentators have suggested that viewing hate speech as a special category of expression, unworthy of traditional protection, will result in unpredictable consequences. "The analytical framework that classifies certain utterances as expressive behaviors as nonspeech makes it far too easy to chip away at the fundamental principles of the First Amendment."[7]

A large number of critics of hate speech codes view such limited restrictions on campus free expression as a threat to the broader realm of free speech and expression. Indeed, this is

the greatest concern advanced by those opposing student conduct policies. "The fear is that any abridgement of free speech is unlikely to remain isolated and that these policies will inevitably lead to justification for more exceptions to free speech."[8] This fear is based on a belief that "the First Amendment protects speech which we hate as much as that which we hold dear."[9] Some view the hate speech code problem as the greatest threat to free expression in American society. "Nowhere is the First Amendment more imperiled than on college campuses."[10]

Other commentators view hate speech code with much less fear and concern. It has been suggested that modest "narrowly drawn prohibitions of racial insults might" not pose an unreasonable threat to the First Amendment and the freedom that it protects." It has also been expressed that hate speech codes are not a threat because opposition "to hurting racial epithets does not impinge on First Amendment values or undermine the purpose of the First Amendment because they give no possibility of the exchange of ideas."[12] Indeed, some commentators feel that hate speech is a class of expression that does not deserve the protection afforded by the First Amendment; "the brutal inarticulate speech of the heart, uttered outside of any discussion of public issues or affairs, might....fall outside of the First Amendment's protection entirely."[13]

Although the heated debate regarding the implications for free discourse and the First Amendment are very interesting and vitally important to our society, this author wishes to concentrate on the practical implications of hate speech and hate speech codes. Those implications touch upon important issues for both education and racial tensions.

Much of the rationale for hate speech codes is based upon the pressured effect that hate speech itself had upon the educational environment, a large number of university administrators feel that, given the characteristics of hate speech and harassment, that "university regulation is

authorized not only to assure equal access to education, but to prevent interference with the educational process, and to preserve an orderly, safe campus environment."[14]

The potential threat to the educational process and educational environment is central to of the advocates of hate speech codes. "Recurring instances of discriminatory behavior undermine institutional efforts to provide equal access to education and to improve the educational environment for all students."[15] The reasons listed by institutions for their regulation of hate speech all focus around educational issues. Patricia Hodulik, a legal counsel, explains:

> The reasons for regulating harassment included the need to assure the rights of individuals to participate equally in the educational process, the desire to help the University fulfill its own policy commitments and legal obligations to provide equal access to education and to prevent discrimination, and the importance of preventing interference with the educational process and maintaining an orderly, hospitable campus environment for learning.[16]

College and university administrators clearly feel that hate speech codes are justified due to the threat that hate speech poses to the educational process and environment.

Many of the assumptions concerning the threat to the educational environment appear to be flawed. For instance, many of these concerns are based upon the belief that a college or university should play a central role in establishing and maintaining societal value. This belief in value inculcation is inconsistent with the role of higher education:

> Even assuming, however, that value inculcation is a legitimate function of primary and secondary schools, that does not necessarily mean that it is legitimate at the university level. Although one purpose of primary and secondary education is the transmission of societal values, the main purpose of a university is a search for knowledge. University students and faculty participate together in a disinterested search for truth. For that reason, any coercive curtailment of unpopular viewpoints in the name of virtue is inconsistent with the very foundation of a university education.[17]

Additionally, the long term values that hate speech codes might nurture could be undesirable. Hate speech codes might produce a generation of college graduates possessing a mind-set that views censorship in a situational manner:

> Leaders will indeed emerge from the ranks of these college and university graduates. Among them will be the lawyers, judges, educators, legislators, and Supreme Court justices of the future. And the mind-set with which they leave the campus in these years is: Some censorship is OK provided that the motivations are OK.[18]

Imposing values upon students is not only inconsistent with the role of higher education, it might also produce values that are detrimental in the long term.

Beyond values, many university officials feel that institutions of higher learning should at least be responsible for the behavior of students. Any educator or other individual who has dealt with college students, can detail the difficulties associated with regulating behavior. The regulation of behavior surrounding hate speech incidents is uniquely prone to failure. The long history of the failure of censorship has been well documented.[19] Furthermore, compelling virtuous behavior may simply backfire:

> Universities that wish to create or maintain certain values in their students, however, cannot accomplish their aim merely by coercing virtuous behavior. Indeed, as with voting, an attempt to compel virtuous behavior may backfire, creating nothing but resentment and refusal to consider the underlying normative questions. In particular, censoring expression in an attempt to create virtue is likely to make the censored speech more, rather than less, appealing.[20]

Universities could simply end up with more of what they are trying to prevent.

Some advocates of hate speech codes feel that students are in need of special protection from hateful or abusive language because they are a captive audience of sorts. This belief is flawed:

> First, students in general may well be extremely vulnerable when they arrive at college and, therefore, more easily traumatized by racist speech. That fact alone, however merely describes individualized vulnerabilities that may exist in a wide array of places--it fails to distinguish the campus from other fora except by asserting that the concentration of vulnerable people is higher on campus than in society in general.[21]

There's simply no legitimate reason to view students as inherently more vulnerable simply because they are on campus.

Most of the arguments supporting hate speech codes focus around the notion that establishment and maintenance of a university "community" is essential. It has been suggested that hate speech can "erode the tolerance that is fundamental to the existence of a university community."[22] The president of Yale University has been quoted as saying that "these codes make a terrible mistake...Students think that they are codes about building communities that are based on correct thoughts, and that's antithetical...to the idea of a university."[23] In other words, maintenance of a "correct" community is not a legitimate aim for a university.

Every community--including a university or college community--must accept some degree of violation of its norms. McGowan and Tangri explain:

> With respect to content-based restrictions on speech, the members of a community therefore must at some point allow for speech that violates community norms. The alternative is to embrace a static community in which ideas and norms evolve internally, if at all, and in which the community adjures the possibility that any views outside its norms could possibly have merit.[23]

Without an allowance for the violation of community norms, a great deal of free expression could be suppressed. Even a narrow standard "may permit the suppression of an extraordinary amount of speech."[24] The concept of the need to establish community is a thinly-veiled means of restricting free speech. Communitarian "theory claims support from the argument from democracy, with its concern for equality, as an affirmative mandate for restrictions on speech."[25]

Although many hate speech codes are implemented with the intent of improving education, they often have the opposite effect. The problems associated with hate speech codes can be numerous:

> As Doe makes clear, carelessly crafted anti-discrimination codes have many undesirable tendencies. They can impede classroom discourse, taint the integrity of controversial yet valuable social science research, and sterilize dialogue on any contentious subject. Moreover, some of these rules violate the free speech guarantees of the Constitution and probably the corresponding provisions in state constitutions as well. By casting a "pall of orthodoxy" over the intellectual and social life of the campus, such policies overshadow many of the university's special virtues. If administered dogmatically, these codes can rob the university of its vitality and prevent it from serving its unique function in a liberal society.[26]

Hate speech codes can infringe upon the academic pursuit of knowledge.

The pursuit of knowledge and the search for the truth are primary aims of every institution of higher learning; "The pursuit of knowledge and the truth--the goal at the core of every university's identity--is the primary purpose of our institutions of higher learning."[27] The educational mission of every college and university "includes promotion of the free exchange of ideas, the pursuit of knowledge, and a tolerance of diversity in opinions."[28] These goals are infringed upon by hate speech regulation. A university is clearly a place where the pursuit of knowledge and the search for the truth are vital, and "a university is a place where people have to have the right to speak the unspeakable and think the unthinkable, and challenge the unchallengeable."[29]

Many hate speech codes are also designed to protect women, minorities, and others who might be victimized by hate speech. Hate speech reformers and advocates are often driven by the goal of "creating and sustaining true equality on campus by eradicating speech that makes minorities, women, and gays feel unwanted."[30]

The protection of minorities and others often victimized by hate speech is certainly a noble goal. Hate speech codes are not an effective device for such protection. A number of critics of hate speech codes suggest that "informal constraints already present in the academic setting on teachers and students" can work to curb racism.[31]

Hate speech restrictions have actually made the struggle for equality more difficult. Bartlett and O'Barr explain:

> A focus on the verbal and symbolic abuse....has the unintended consequence of further reinforcing the invisibility of those everyday forms of oppression. First, by comparison, these behaviors seem so trivial, so harmless, so ordinary....Second, this focus on regulation reinforces a conceptualization of racism, sexism, and heterosexism as blatant and intentional with specific perpetrators and specific victims. This conceptualization...makes it more difficult to recognize and respond to the kind of racist, sexist, or heterosexist behaviors that are subtle, unknowing, and without a single clear perpetrator or intended victim.[32]

Obviously, the use of a regulatory response to hate speech is problematic.

"Some black scholars and activists maintain that an anti-racist speech policy may perpetuate a paternalistic view of minority groups" because such a policy suggests "that they are incapable of defending themselves against biased expressions."[33] Some members of the black community feel that such policies are not only paternalistic, but incapacitating as well:

> The basic problem with all these regimes to protect various people is that the protection incapacitates...To think that I [as a black man] will...be told that white folks have the moral character to shrug off insults, and I do not...That is the most insidious, the most insulting, the most racist statement of all!"[34]

Hate speech restrictions do appear to place blacks and other groups in a special class that is deemed incapable of defending itself.

Hate speech policies might also preclude the pursuit of a real solution to the problems of racism and sexism. An "anti-hate speech policy stultifies the candid intergroup dialogue

concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination."[35] The fixation with hate speech codes is a distraction to the resolution of the root causes of racist and sexist conduct. The hate speech debate "may even stymie a full analysis of the wider range of subordinating behaviors that characterize racism, sexism, and heterosexism on college campuses in this country."[36] The use of hate speech codes might force racist and sexist behaviors underground along with ideas that might help to resolve such behavior. If "such bans succeed in suppressing obnoxious impulses, they merely drive them underground--along with many ideas that deserve to be aired, if only to kindle a more heated debate."[37] Indeed, the use of a hate speech code approach is diversionary. "It makes it easier for communities to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, approaches for combating racial discrimination."[38]

Hate speech codes also tend to make matters worse because they have the effect of glorifying racist and sexist speakers. "Advocates of hate speech regulation do not seem to realize that their own attempts to suppress speech increased public interest in the ideas they are trying to stamp out."[39] Bigots become celebrities.

Many critics of hate speech codes suggest that the "marketplace of ideas"--free open discussion and debate--be allowed to replace the codes as a means of resolving racism, sexism, and homophobic behavior. "Few institutions better exemplify the 'marketplace of ideas'" than our nation's colleges and universities.[40] Allowing the marketplace of ideas to function seems to provide a logical alternative to the regulatory approach. McGowen and Tangri explain that:

> Persons offended by racist or homophobic speech, for example, are, in an admittedly formal sense, treated precisely the same as any other person. Thus should they wish to reply with equally offensive speech, they are free to do so. Should they choose to respond with rational discourse demonstrating the

> irrationality of the prior insult, they may do so and all concerned will be the better for it.[41]

The marketplace of ideas provides a means for redress, resolution, and real results.

Some advocates of hate speech codes feel that the marketplace of ideas will fail because hate speech does not communicate ideas or information. Those advocates are wrong. Hate speech does communicate. Such expressions convey information and ideas. "If they did not have some communicative effect on the hearer, then the hearer would neither understand or care about hearing them."[42] Some advocates of hate speech codes feel that hate speech should not even be considered speech. That view is obviously simplistic.[43]

The struggle against racism and sexism cannot be waged on the legal or regulatory battleground. Eric Bender explains:

> To empower these students to cope with racism, society must allow them to discuss the subject freely. Any restrictions that judges, lawmakers, or school boards may put on racist speech will not suppress the ideas behind it. The battle between racism and equality is waged in people's minds and hearts--constitutionally protected havens from courts, legislatures, and schools.[44]

The best solution to the problems being addressed by the restriction of speech is actually the expansion of speech. A black activist was quoted as explaining the following:

> As a former student activist, and as a current black militant, [I] believe [ ] that free speech is the minority's strongest weapon....[P]aternalism [and] censorship offer the college student a tranquilizer as the antidote to campus and societal racism. What we need is an alarm clock....What we need is free speech....and more free speech!"[45]

Many of the opponents of hate speech codes urge the expansion of free speech and more direct actions as a solution:

> Some opponents of antiracism rules urge that "[m]ore speech, not less, is the proper cure for offensive speech." Jon Weiner, for example, calls on universities to speak out forcefully and frequently on why racist speech is objectionable.

> Others urge that universities focus on underlying racist attitudes rather than on their outward manifestations, or address racism through teaching and example.[46]

The answer to much of what currently troubles American college campuses may well be in the pursuit of ideas, opinions, and information even if it is considered hateful.

The possibility that open discourse might spread sexist and racist ideas should not be a cause for alarm. "It is simply a necessary risk for a nation committed to the principle of liberty."[47] It is also not a very serious risk given the practical benefits associated with the open pursuit of knowledge and the potential for resolving the factors which cause racism and sexism.

ENDNOTES

1. Nancy Gibbs, "Bigots in the Ivory Tower: An Alarming Rise in Hatred Roils U.S. Campuses", Time, May 7, 1990, p. 106.

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5. "Recent Cases: First Amendment--Racist and Sexist Expression on Campus", Harvard Law Review, April, 1990, p. 1397.

6. Nat Heroff, "The New Jacobins", Reason, November, 1991, p. 32.

7. See, for example, Sean Selegue, "Campus Anti-slur Regulations: Speakers, Victims, and the First Amendment," California Law Review, May, 1991, p. 939.

8. John Hulshizer, "Securing Freedom from Harassment Without Reducing Freedom of Speech: Doe v. University of Michigan", Iowa Law Review, January, 1991, pp. 394-395.

9. Richard Delgado, "Campus Anti-Racism Rules: Constitutional Narratives in Collusion," Northwestern University Law Review, Winter, 1991, p. 376.

10. Gibbs, p. 106.

11. J. Peter Byrne, "Racial Insults and Free Speech Within the University", Georgetown Law Journal, February, 1991, p. 427.

12. Laurence Weinstein, "Policing Prejudice on Campus", The Education Digest, November, 1990, p. 10.

13. Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," Law and Contemporary Problems, Summer, 1990, p. 215.

14. Patricia B. Hodulik, "Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests," Journal of College and University Law, Spring, 1990, p. 579.

15. Ibid, p. 573.

16. Ibid, p. 587.

17. Suzanna Sherry, "Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech", Minnesota Law Review, February, 1991, p. 943.

18. Hentoff, p. 33.

19. See, for example, Nadine Strosser, "Regulating Racist Speech on Campus: A Modest Proposal?", Duke Law Journal, June, 1990, p. 370.

20. Sherry, p. 936.

21. David McGowen and Ragesh Tangri, "A Liberation Critique of University Restrictions on Offensive Free Speech", California Law Review, May, 1991, p. 903.

22. Hodulik, p. 573.

23. McGowan and Tangri, p. 864.

24. Ibid, p. 865.

25. Ibid, p. 867.

26. Evan Siegal, "Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities", Emory Law Journal, Fall, 1990, p. 1398.

27. Ibid, p. 1315.

28. Ibid, p. 1387.

29. Hentoff, p. 32.

30. Ibid, p. 31.

31. Hulshizer, p. 394.

32. Bartlett and O'Barr, p. 582.

33. Strassen, p. 572.

34. Ibid, p. 486.

35. Ibid, p. 561.

36. Bartlett and O'Barr, p. 574.

37. Gibbs, p. 106.

38. Strassen, p. 557.

39. Ibid, p. 557.

40. Siegel, p. 1387.

41. McGowan and Tangri, pp. 881-882.

42. Selegue, pp. 938-939.

43. See Selegue, p. 939.

44. Eric D. Bender, "The Viability of Racist Speech from High School to Universities: A Welcome Matriculation", Cincinnati Law Review, Winter, 1991, p. 903.

45. Strossen, p. 487.

46. Delgado, p. 361.

47. Bender, p. 897.